THE HONOURABLE SRI JUSTICE B.SESHASAYANA REDDY

W.P.No. 12283 OF 2002

A N D

W.P.No. 4959 OF 2002

Dated: 31-10-2005

Between:

W.P.No. 12283 OF 2002

M/s Omyal Agro Industries Ltd., Chennai. …Petitioner

A N D

1. Appellate Authority for Industrial and

Financial Reconstruction, New Delhi and Others …Respondents

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COMMON ORDER:

1. These two petitions arise out of orders passed by the Board of Industrial &

Financial Reconstruction, New Delhi (herein after referred to as 'BIFR' for brevity) as confirmed by Appellate Authority for Industrial and Financial Reconstruction, New Delhi (herein after called 'AAIFR' for brevity) in Case No. 4 of 1995.

2. The brief facts of the case leading to filing of these two petitions are: The petitioner is a company registered under Companies Act. An application came to be filed before the BIFR to declare the company as sick industrial company. The 5th respondent-Andhra Bank, who is the sole security creditors resisted the application of the petitioner. Apart from resisting the application, the Bank also initiated proceedings before the Debt Recovery Tribunal, Visakhapatnam for realization of the amounts due from the petitioner company. O.A. filed by the Bank came to be numbered as O.A.No.8 of 2002. BIFR by order dated 13-8-2001 directed for winding of the company in accordance with the provisions of law apart from issuing certain other directions. The operative portion of the order passed by the BIFR on 13-8-2001 reads as follows:

> "*a) The Bench declared the MOU dated 21-4-2000 entered into between the company and SSEL as unacceptable, as the same was out side of the scope of the sanctioned scheme and was made without any permission of the Board or of the Andhra Bank. The company would take over the possession of the unit/factory with all its assets to the satisfaction of the Andhra Bank and the OA/Board immediately and report compliance .*
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> *b) The company would submit within 30 days the statement of its accounts with the City Union Bank & SBI (from the date of opening of accounts till their closure), duly certified by its Chartered Accountant, to the Board (4 copies each). O.A. (2 copies each) and Andhra Bank (one copy each)*
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> *c) The company would pay OA/MA fee to 11BI of Rs. One lakh for the first year from the date of appointment of IIBI as the O.A. and thereafter Rs.25,000/- per year, besides reimbursement of the actual expenditure incurred by IIBI.*
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> *d) Andhra Bank and other secured lenders, if any, may take legal action against the company promoters guarantors, for recovery of their dues".*

3. Assailing the order passed in Case No. 4 of 1995 on the file of the BIFR, the petitioner company filed an appeal being Appeal No. 318 of 2001 on the file of the

Appellate Authority for Industrial and Financial Reconstruction. The appellate authority modified the order of BIFR by judgment dated 24-12-2001. The relevant portion of judgment of the Appellate Authority reads as follows:

> *"In view of the above discussion, BIFR's direction in para 8 of order dated 13-8-2001 (vide para 4(a) above) is set aside. As regards the appellant's second grievance (vide para 4 (b) above), the continued operation of the appellant's factory by SSEL, pending final adjudication by the appropriate tribunal/Court/High Court, is permitted subject to the following conditions: the amount of Rs.5 lakhs received as advance by the appellant from SSEL shall be deposited with AB within fifteen days; the appellant (or SSEL) shall deposit royalty @ Rs. 2 lakhs p.m. from May, 2000 onwards with AB (amount of rs. 40 lakhs for the period May, 2000 to December, 2001 can be deposited in two installments of Rs. 20 lakhs each in January and February, 2002 along with monthly installments of Rs.2 lakhs for each month), no withdrawal shall be made by the appellant/SSEL from out of the amount of Rs. 65 lakhs in the escrow account pursuant to MOU dated 21-4-2000. AB shall keep the aforesaid amounts in no-lien account, pending final adjudication by appropriate tribunal/Court High Court. If the appellant/SSEL fail to comply with the aforesaid terms, AB shall be free to take appropriate steps to protect its interests, including inter-alia seeking appointment of receiver for taking over possession of the appellant's factory and other assets.*
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> *18. As regards the third grievance of the appellant (para 4 © above), the learned counsel for the appellant urged; the appellant is willing to pay the actual expenses of IIBI for its work as OA/MA, AAIFR has not accepted the OA's claim for any annual charge in addition to actual expenses in any case and has allowed payment of actual expenses only if the OA/MA is not a creditor of the sick industrial company.*
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> *19. In response to a query from the Bench, IIBI's representative stated that it had not sent any bill to the appellant for the expenses incurred by it as OA/MA in this case but its actual expenses were about Rs.50,000/-. Learned counsel fro the appellant, with instruction from Mr. V.Krishnamurthy, Advisor, who was present, stated that the appellant was prepared to pay Rs.50,000/- to IIBI in full and final settlement of its claim to fees for its work as OA/MA in this case.*
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> *20. As IIBI is not a creditor of the appellant company, it cannot be expected to provide the services as OA/MA ex-gratia. IIBI is entitled to fees for its work as OA/MA by way of reimbursement*

of actual expenses. There is no legal basis for claiming any annual charge, in addition to actual expenses, as fees for work as OA/MA. IIBI could claim either actual expenses or a mutually acceptable annual fee in lieu of actual expenses. By allowing an annual charge in addition to actual expenses, BIFR has in fact imposed a tax penalty on the appellant for which there is no justification. The impugned direction is set aside. The appellant shall pay Rs.50,000/- (Rupees fifty thousands only) to IIBI within a fortnight from the date of receipt of a copy of this order, without asking for a bill for IIBI, and this will be the full and final settlement of IIBI's claim of fees for its work as OA/MA in this case.

21. The appeal stands disposed of (vide operative paras 17 to 20)".

Hence, these two writ petitions.

4. Pending these writ petitions, the petitioner filed WPMPs 27323 of 2005 and 27346 OF 2005 to declare the company as no more a sick company and consequently beyond the purview of the Sick Industrial Companies (Special Provisions) Act, 1985.

5. The respondents did not choose to oppose those applications.

6. Accordingly, WPMP Nos. 7323 of 2005 and 27346 of 2005 are allowed permitting the petitioners to amend the prayer in the writ petitions.

7. Now the issue survives for adjudication in these writ petitions is whether the petitioner company continues to be a sick company within the meaning of the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

8. The petitioner company approached the BIFR to declare it as a sick company. The sole security creditor, Andhra Bank resisted the application. On obtaining permission from the BIFR the sole security creditor initiated proceedings for recovery of security debt. Ultimately, the proceedings initiated by the Andhra Bank for realization of the security debt ended in compromise and consequently the 4th respondent Bank withdrew the proceedings. As on this day, there is no amount due to the secured creditor. The amount due to unsecured creditors have been converted into equities and thereupon the network of the company has become positive.

9. In that view of the matter, the company is no more a sick company.

10. Accordingly, both the writ petitions are allowed and thereby declaring the petitioner company is no more a sick company. No order as to costs.

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B.Seshasayana Reddy,J

31st October, 2005.

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